



DRAFT – NOT TO BE COPIED – FOR DISCUSSION ONLY – PROTECTÉ

OFFICE OF THE PROCUREMENT OMBUDSMAN



PROCUREMENT PRACTICE REVIEW

*REVIEW OF PROCUREMENT PRACTICES FOR THE ACQUISITION OF
SPECIFIC SUBJECT MATTER TRAINING SERVICES*

BY

THE CANADA SCHOOL OF PUBLIC SERVICE

OTTAWA
JUNE 2012

PROMOTING FAIRNESS, OPENNESS AND TRANSPARENCY IN FEDERAL PROCUREMENT

Office of the Procurement Ombudsman

Constitution Square
340 Albert Street, 11th Floor
Ottawa, Ontario K1R 7Y6

Toll Free: 1-866-734-5169
FAX: 613-947-9800

ISBN: 978-1-100-20780-3
Cat. No.: P114-4/2012E-PDF

This publication is also available at:
www.opo-boa.gc.ca

Table of Contents

INTRODUCTION	1
CONTEXT	1
SCOPE AND PERIOD OF THE REVIEW	2
REVIEW OBJECTIVE AND METHODOLOGY	2
BACKGROUND.....	2
REVIEW OBSERVATIONS	5
CONCERN 1 - REPETITIVE SOLE SOURCE AND CONTRACT SPLITTING	5
<i>Analysis</i>	5
<i>Observations</i>	6
<i>Conclusions</i>	7
CONCERN 2 - FILE DOCUMENTATION	8
<i>Analysis</i>	8
<i>Observations</i>	9
<i>Conclusions</i>	10
CONCERN 3 - CONDUCT OF COMPETITIVE PROCESSES	11
<i>Analysis</i>	11
<i>Observations</i>	11
<i>Conclusions</i>	13
CONCERN 4 - UNDISCLOSED REQUIREMENT AND ACCEPTANCE OF NON-COMPLIANT BID.....	13
<i>Analysis</i>	13
<i>Observations</i>	14
<i>Conclusions</i>	14
CONCERN 5 - MANAGEMENT CONTROL FRAMEWORK	15
<i>Analysis</i>	15
<i>Observations</i>	15
<i>Conclusion</i>	16
FINAL OBSERVATIONS AND CONCLUSIONS	17
COMMENTS FROM THE CSPS	18
ANNEX A:	19

Introduction

Context

- 1) On June 22, 2011, an Office of the Procurement Ombudsman (OPO) stakeholder raised concerns regarding the award of contracts by the Canada School of Public Service (the CSPS) on a sole source basis to the same supplier over the period from June 2009 to June 2011. The services to be provided were for specific subject matter training. The stakeholder claimed the CSPS favoured a specific supplier (the Supplier) in awarding contracts and was therefore not fair, open and transparent in its procurement practices.
- 2) Paragraph 22.1(3)(a) of the *Department of Public Works and Government Services Act* and subsection 4.(1) of the *Procurement Ombudsman Regulations* (the Regulations) provide the Procurement Ombudsman with the authority to review the procurement practices of departments and agencies to assess their fairness, openness and transparency if there are reasonable grounds to do so. As a result of the information provided by the stakeholder, it was determined there were reasonable grounds to conduct this review.
- 3) Simultaneously, the same stakeholder submitted a complaint to OPO regarding the award of a specific contract, identified as contract #12 throughout this report. Contract #12 was the most recent contract awarded in a series of similar contracts from June 2009 to June 2011. Section 9 of the Regulations requires contract award complaints to be investigated if they meet the prescribed criteria outlined in paragraphs 9(1)(a) to 9(1)(d) of the Regulations.
- 4) Pursuant to OPO's standard operating procedures, we contacted the CSPS in an attempt to address an issue raised by the stakeholder related to the use of one of the evaluation criteria in the Request for Proposal (RFP) prior to the award of contract #12. During this discussion, OPO acknowledged that the criterion at issue was similar to one used by other federal organizations.
- 5) The investigation into the stakeholder's allegation concerning the award of contract #12 did not produce the evidence necessary to support the allegations brought forward. However, the investigation did identify some shortcomings in the procurement process. In addition, contracting issues become apparent when the processes used to acquire the services for the specific subject matter training from June 2009 to June 2011, including contract #12, are examined. These issues are discussed in this report.
- 6) OPO defines fairness, openness and transparency as follows:
 - a. Fairness—Providing equal treatment to all current and potential suppliers;
 - b. Openness—Providing all potential suppliers with the opportunity to submit bids for Government Procurement; and

- c. Transparency—Providing information to Canadian in a timely manner that facilitates public scrutiny of the decisions made and actions undertaken.

Scope and Period of the Review

- 7) The scope of this review was limited to the award of all contracts issued during the period from June 2009 to June 2011 by the CSPA to the Supplier for the provision of specific subject matter training. Table 1 provides an overview of the total dollar value of the contracts for the subject matter training services issued to the Supplier by the CSPA for the period under review.

Review Objective and Methodology

- 8) The objective of the review was to determine if the procurement processes used by the CSPA to award the contracts to the Supplier for the specific subject matter training were fair, open and transparent.
- 9) To achieve this objective, OPO completed an analysis of 12 procurement files for the contracts awarded to the Supplier from June 2009 to June 2011. A total of 14 contracts were awarded by the CSPA to the Supplier during this period; however, 2 of the 14 files were related to other subject matter training and therefore not considered for the purpose of this review. OPO also considered the federal legislative, regulatory and policy frameworks related to the contracts in question and, during the course of this review, obtained written comments from the CSPA.

Background

- 10) The CSPA is the federal government's common learning provider responsible for providing training to federal public servants. To achieve its mandate, the CSPA may deliver training itself or choose to contract out the delivery of training. The CSPA's financial model is based in part on cost recovery.
- 11) The CSPA, in conjunction with the Treasury Board of Canada Secretariat (TBS), developed and established new subject matter training as a result of changes in policy. The Supplier, who is a former public servant in receipt of a pension, had worked with TBS to develop the particular policy and was recommended to the CSPA as a potential provider of the related subject matter training and pilot.
- 12) Contract #1 was awarded by the CSPA to the Supplier on a sole source basis to deliver and perform an assessment of the pilot training (see Table 2 for the complete list of contracts and Annex A for the timeline). The pilot was held in June 2009. Contract #2 was awarded to the Supplier to deliver the same training for an additional six sessions in the National Capital Region (NCR). Within the same fiscal year (2009–10), contracts #3, #4 and #5 were also awarded to the Supplier. Contracts #3 and #5 were each awarded for the delivery of one training session per contract in the Atlantic Region. Contract #3 was for the delivery of

the session in February 2010, while contract #5 provided for the delivery of the session in the next fiscal year. Contract #4 was issued in order to expand the work delivered in contract #2 by adding four training sessions in the NCR.

- 13) A total of six contracts were awarded to the Supplier to deliver the same training in 2010–11. Contracts #7, #8, #10 and #11 were awarded on a sole source basis. Contracts #6 and #9 were awarded through competitive processes. Contract #6, which was awarded for the delivery of the training in the Pacific Region, was competed because the estimated value of the contract was above the delegated contracting authority for sole source contracts in that region. Contract #9 was awarded in the NCR and was competed because the Procurement and Contracting Unit (PCU) advised those responsible for the subject matter training (the Program) that sole source contracts should no longer be awarded to the Supplier.
- 14) As of June 2011, one contract (contract #12) had been awarded for the delivery of the subject matter training in 2011–12. It was awarded on a competitive basis to the Supplier. This last contract was the subject of the complaint received by OPO, resulting in OPO's investigation into the complaint.

Table 1: Total dollar value of all contracts for the subject matter training services issued to the Supplier by fiscal year

	Sole Source			Competitive			Grand Total	% Competed
	NCR	Regions	Total	NCR	Regions	Total		
2009-10	\$35,700.00	\$11,300.00	\$47,000.00	\$0.00	\$0.00	\$0.00	\$47,000.00	0%
2010-11	\$23,250.00	\$9,287.86	\$32,537.86	\$23,730.00	\$12,709.79	\$36,439.79	\$68,977.65	53%
2011-12*	\$0.00	\$0.00	\$0.00	\$54,240.00	\$0.00	\$54,240.00	\$54,240.00	100%

*The information covers the period from April 2011 to June 2011.

Table 2: Contracts for subject matter training services issued to the Supplier

Contract #	Date Contract Issued	Contract Period	Dollar Value	Procurement Method		Location		PCU Involved
				Sole Sourced	Competed	NCR	Region	
1	May 25, 2009	June 4-23, 2009	\$4,200.00	x		x		No (NCR Program)
2	September 3, 2009	September 23, 2009 to January 8, 2010	\$18,900.00	x		x		Yes (C.O. #1)
3	December 22, 2009	December 22, 2009 to March 31, 2010	\$5,650.00	x			x	No (Region #1)
4	January 4, 2010	February 17 to March 26, 2010	\$12,600.00	x		x		Yes (C.O. #2)
5	March 23, 2010	March 23 to June 30, 2010	\$5,650.00	x			x	No (Region #1)
6	April 4, 2010	April 1 to July 21, 2010	\$12,709.79		x		x	Yes (C.O. #3)
7	June 3, 2010	June 10-15, 2010	\$6,300.00	x		x		No (NCR Program)
8	July 27, 2010	July 27 to August 31, 2010	\$16,950.00	x		x		Yes (C.O. #2)
9	August 25, 2010	September 1, 2010 to March 4, 2011	\$23,730.00		x	x		Yes (C.O. #3)
10	November 11, 2010	November 14, 2010 to March 31, 2011	\$4,787.86	x			x	No (Region #3)
11	February 8, 2011	February 14 to March 31, 2011	\$4,500.00	x			x	No (Region #1)
12	May 27, 2011	May 15, 2011 to September 30, 2012	\$54,240.00		x	x		Yes (C.O. #5)
Total			\$170,217.65	9	3	7	5	

PCU: Procurement and Contracting Unit
C.O.: Contracting Officer

	Fiscal year 2009–10
	Fiscal year 2010–11
	Fiscal year 2011–12

Review Observations

- 15) OPO's analysis of the files revealed concerns regarding:
 - a. Repetitive sole sourcing and contract splitting;
 - b. File documentation;
 - c. Conduct of competitive processes;
 - d. Undisclosed requirements and acceptance of a non-compliant bid; and
 - e. The CSPS Management Control Framework.

Concern 1—Repetitive sole sourcing and contract splitting

Analysis

Repetitive sole sourcing

- 16) The CSPS Contracting Policy defines repetitive sole source contracting as “the practice of contracting with the same supplier without regard to the competitive process.”
- 17) In addition, the CSPS Contract Management Framework—Procurement and Contracting Desk Guide for Fund Centre Managers and Admin Officers states, “whenever the same area in the School proposes to award a sole source contract to the same supplier for the 3rd time within a 12-month period, that contract would have to be referred to the PCU and/or the [Contract Review Committee] prior to award, regardless of dollar value.”

Contract splitting

- 18) The TBS Contracting Policy and the CSPS Contracting Policy define contract splitting as “the practice of unnecessarily dividing an aggregate requirement into a number of smaller contracts, thereby avoiding controls on the duration of assignments or contract approval authorities.”
- 19) Further, the CSPS Contract Management Framework—Procurement and Contracting Desk Guide for Fund Center Managers and Admin Officers defines contract splitting as a “practice of separating the value of an opportunity in two or more components in order to issue contracts within certain thresholds allowed. This practice circumvents procurement and contracting rules, and may lead to delegated authorities being removed from the Fund Centers involved.”
- 20) The contract approval authorities or limits which could apply to the procurement(s) at issue are as follows:
 - a. Section 5 of the *Government Contracts Regulations* (the GCR) stipulates that contracts must be competed at all times, unless they meet one of the exceptions in Section 6 of the GCR. The only exception that could be applicable in this case is paragraph 6(b)(i), which indicates that a contracting

- authority does not have to solicit bids if the estimated expenditure does not exceed \$25,000.00.
- b. The CSPS Delegation of Financial Signing Authority Matrix provides for an approval authority of \$5,000 for cost center managers and \$10,000 for directors to enter into non-competitive contracts.
 - c. The TBS Contracting Policy limits to \$25,000.00, including taxes and all amendments, the approval authority for awarding contracts without competition to former public servants in receipt of a pension. Contracts exceeding this value require TBS approval.

Observations

- 21) OPO reviewed the Statement of Work (SoW) in each of the contracts for the subject matter training. With one exception, the deliverables in all the contracts consistently related to the delivery of the same training. Only the delivery dates and sometimes the location varied. The one exception was contract #8. Its SoW mainly related to updating the training material, though it did include the delivery of one subject matter training session.
- 22) A total of five contracts were issued on a sole source basis to the Supplier for the delivery of the same services from June 2009 to March 2010 before a competitive process was initiated in April 2010. Of the five sole source contracts, contracts #1, #2 and #4 were issued by the NCR and contracts #3 and #5 were issued by the Atlantic Region.
- 23) The CSPS policy requires that a proposed contract be referred for approval by the PCU and/or the Contract Review Committee (CRC) before a third contract is awarded to the same supplier within a 12-month period. Three times within a 12-month period from June 2009 to June 2011, the same area of the CSPS issued three sole source contracts to the Supplier.
- 24) When contract #4, in the amount of \$12,000.00, was awarded on a sole source basis to the Supplier, the last training session of contract #2, worth \$18,900.00, also awarded to the Supplier on a sole source basis, had not yet been delivered. As the additional work to be delivered was for the same service and therefore only additional dates were required, contract #2 should have been amended to avoid contract splitting. Instead, a new contract, contract #4, was issued for the additional work. The total value of both contracts was \$30,900.00, which is above the limit for awarding a contract without competition, including all amendments, to a former public servant in receipt of a pension, as per the TBS Contracting Policy.
- 25) OPO could only find evidence that PCU approval was sought for the award of contract #8. At that time, the PCU informed the Program that no other sole source contracts would be issued to the Supplier, and requested the Program to

commit in writing that all future requirements would be competed. The Program does not appear to have followed the PCU's advice.

- 26) Records indicate that contract #8 was awarded on a sole source basis, followed by contracts #10 and #11, also awarded on a sole source basis by two regional offices.

Conclusions

- 27) OPO concludes the following:
- a. Regarding repetitive sole sourcing: The CSPA entered into repetitive sole source contracting with the Supplier. A total of six contracts were issued on a sole source basis within the period from June 2009 to June 2010, which is in direct violation of the CSPA Contracting Policy. Only once was the required approval sought and obtained from the PCU. Repetitive sole source contracting occurred again during the period from March 2010 to February 2011. For this period, no evidence was found on file indicating that the required PCU and/or CRC approval to sole source again with the same supplier had been sought, or providing a rationale for why such approval had not been sought.
 - b. Regarding contract splitting: Based on the information examined, the award of the contracts in question constitutes contract splitting and is the direct result of repetitive sole sourcing with a predetermined supplier. Of particular concern to OPO is the breach of the TBS Contracting Policy. The last training session of contract #2 had not been delivered when contract #4 was awarded. In circumstances where a contractor's services are needed beyond the life of the original contract and this need was not anticipated, the TBS Contracting Policy requires the contract to be amended. In the case of contracts #2 and #4, the CSPA issued contract #4 while contract #2 was still being executed. As it is apparent there was an ongoing need for the training, the CSPA was required to amend contract #2 and obtain the necessary approval from the Treasury Board to amend the contract above the delegated authority. Instead, the CSPA issued a separate contract, contract #4. The limit for awarding contracts to a former public servant in receipt of a pension is \$25,000, including taxes and any amendments. The combination of those two contracts would have resulted in a contract valued at \$30,900.

It is not possible within the scope of this review for OPO to conclude that this contract splitting was done intentionally to avoid contract approval thresholds.

Concern 2—File documentation

Analysis

Justification for sole sourcing

- 28) Whenever contracts are awarded on a sole source basis, the TBS and CSPA contracting policies require that the decision and the appropriate justification be included on file.
- 29) The CSPA Contract Management Framework—Procurement and Contracting Desk Guide for Fund Centre Managers and Admin Officers further states, “an explanation as to why it is not considered cost-effective to solicit bids competitively as well as the reason for selecting the chosen supplier must be placed on file when this exception to the norm is invoked.”

Price support

- 30) When the requirement is not competed or when only one bid is deemed compliant following a competitive process, the TBS and CSPA contracting policies require supporting evidence that the price charged by a supplier is comparable to the market price or is in line with the price the supplier charges to other clients.
- 31) Further, the CSPA Contract Management Framework—Procurement and Contracting Desk Guide for Fund Centre Managers and Admin Officers states, “price support information typically involves requiring that suppliers provide copies of invoices or contracts relating to the same or similar services, in order to substantiate that the prices charged to the Federal Government are the same or lower than prices charged to other clients.”

Procurement and Contracting Checklist

- 32) The Procurement and Contracting Checklist is a tool developed by the PCU to assist program managers. Its purpose is to identify potential challenges or issues within procurement processes. The CSPA Contract Management Framework—Procurement and Contracting Desk Guide for Fund Centre Managers and Admin Officers states, “the Checklist is an integral part of the PR¹/PR Amendment forms that need to be submitted by Fund Centres to the PCU.” The Checklist is required in every contracting file when the contract is valued at more than \$10,000.

¹ PR = Purchase Requisition, which is an internal document used to commit funds to initiate purchase as required by section 32 of the *Financial Administration Act*.

Observations

Justification for sole sourcing

- 33) Contracts were awarded to the Supplier without competition nine times in the period from June 2009 to June 2011; six times in the NCR and three times in the regions. Sole source justification was in all but one of the nine files. There was no appreciable distinction between the justifications, which were only slightly different in their wording. Five of the sole source justifications indicated that an RFP was being prepared and that there was not enough time to complete the solicitation process before the course delivery dates.
- 34) The justification that consistently appears in seven files was “[the Supplier] has extensive experience in the administration of [subject matter training] at senior levels of Government. [The Supplier] is currently a professional [c]onsultant in the field of [subject matter]. In addition [the Supplier] is a certified professional instructor, course designer and facilitator and is fluently bilingual. Based on [the Supplier’s] combination of experience in the field of [subject matter], as an operational manager, as a speaker and as a course designer and trainer, I recommend the School hires [the Supplier].”
- 35) The only justification that is an exception to the above is the one provided for contract #10. The justification in this file mentioned that public servants were considered when fulfilling the requirement. The rationale to award the contract to the Supplier on a sole source basis was “no public servants were available to provide the training,” as well as the fact that, of the two companies considered, one indicated it was too busy to undertake the work. However, it was noted in the sole source justification, “to accommodate the availability of our instructor, [the Supplier], we are unfortunately required to re-schedule the January delivery to February 23–25, 2011....”

Price support

- 36) OPO could not find price support in the files for the contracts issued to the Supplier. The only price-support-related information OPO could find was a box checked “Yes” in answer to the question “price and payment terms are acceptable? (i.e. ... comparable with prices previously charged by the supplier)” on the Procurement and Contracting Checklist. An examination of the fees charged by the Supplier revealed that the price offered remained constant in the 12 contracts.

Procurement and Contracting Checklist

- 37) For the period under review, the Procurement and Contracting Checklist, which is a procurement control tool, was required in 6 of the 12 contract files for the subject matter training services, as the value of each contract was above \$10,000. The Checklist was contained in 4 of the files, but absent for contracts #9 and #12.

- 38) OPO observed omissions in the checklists contained on file for contracts #2, #4, #6 and #8, as follows:
- a. Sections were incomplete or left blank for some files, despite the option of “not applicable” in all sections (e.g. the three questions relating to ethics and conflict of interest were not addressed).
 - b. Answers were erroneous, for example,,
 - one answer indicated that the Supplier was not a former public servant in receipt of a pension, when in fact he was, and
 - reference was made to the requirement being consistent with a procurement plan, and in all cases, the answer to the question was “Yes,” but the procurement plan was not in any of the files, nor was there any indication as to where the plan could be found. In addition, the CSPA stated, “[subject matter] courses are not put into a plan. The course is offered throughout Canada and therefore it is on a demand basis (MOU, etc).”
 - c. Justifications are required by the Checklist, but were not provided. For example, a justification had to be provided if the proposed supplier had performed work in the last 12 months, with an explanation as to how the work under the previous contract was different from the current assignment. In this case, the deliverables to be provided were consistently the same, but the justification was not in the files.
- 39) During this review, the CSPA confirmed to OPO that responsibility for ensuring that the Checklist has been completed rests with the PCU contracting officers, while responsibility for data integrity lies with both the PCU and the Technical Authority. In the case of the files reviewed by OPO, neither officer exercised their respective responsibilities.

Conclusions

- 40) OPO concludes the following:
- a. Regarding sole source justification: Although the required justification appeared in most of the files, conspicuously similar wording was used in all the justifications to explain why the contracts were awarded to the same supplier to provide the same service. It may have been acceptable to use the same justification for the pilot and the subsequent contract. As outlined in paragraph 33, the justification “no time to solicit bids” was used five times. The other justification used did not establish the Supplier’s unique skills and was therefore insufficient for subsequent contracts. Also, none of the justifications addressed the CSPA requirement for managers to explain in such cases why it is not considered cost-effective to solicit bids competitively.
 - b. Regarding price support: The TBS and CSPA contracting policies both require price support on file when a contract is awarded on a sole source basis or when only one bid is received so that it can be confirmed that the price is reflective of the market price. Although the price proposed by the

Supplier did not change during the period under review, there is no evidence to demonstrate it was initially verified, nor subsequently substantiated.

- c. Regarding the Procurement and Contracting Checklist: The Checklist appeared in most of the files. However, some were not fully completed and/or contained answers that are questionable. Not utilizing the Checklist for its intended purpose eliminates the benefits that should be derived from it as a key procurement control mechanism.

Concern 3—Conduct of competitive processes

Analysis

- 41) The CSPS Contract Management Framework—Procurement and Contracting Desk Guide for Fund Centre Managers and Admin Officers requires that “[t]he Fund Centre identifies a minimum of 3 suppliers who can submit proposals. A rotation system must be used so that, over time, all potential bidders will have a chance to bid.”
- 42) The Guide further mentions, “the Programs should maintain up-to-date vendor lists of qualified suppliers who provide services commonly used. Such vendor lists should be communicated to the PCU and accessible from a common repository. As a general rule, Programs should retain the services of the best value supplier available, while ensuring an adequate rotation of such suppliers over time.”
- 43) On the subject of vendor lists, the TBS Contracting Policy states, “contracting authorities that keep source lists from which bids are invited, may find it in their interest to establish a regular way to inform industry of this practice. This might take the form of periodic briefings to industry associations accompanied by adequate publicity, departmental public information brochures adequately circulated, newspaper and trade journal advertisements, electronic media advertisements, etc.”

Observations

- 44) The CSPS confirmed that all the contracts for the subject matter training services from June 2009 to June 2011 were awarded exclusively to the Supplier, whether on a sole source basis or through a competitive process.
- 45) For the contracts awarded on a sole source basis, there was only one instance (contract #10) when another potential supplier was considered. The contract was awarded to the Supplier because the other potential supplier’s resources were unavailable.
- 46) A total of three contracts were awarded using a competitive process, contracts #6, #9 and #12.

- 47) The first, contract #6, was awarded for delivery of the training in the Pacific Region. It included both the subject matter and another type of training. The process involved a request for quotation and included two mandatory requirements, namely experience in delivering English courses in the last three years and experience in one of the two types of subject matter training. A total of four potential suppliers were invited to submit quotes. Of the four invited, separate contracts were awarded to two; one of which was the Supplier.
- 48) For contract #9, which was for subject matter training services only, three potential suppliers were invited to submit a proposal. Of the three potential suppliers invited, two had previously been invited and awarded a contract following the process for contract #6. In response to the RFP for the award of contract #9, only one proposal was received and it was from the Supplier. OPO noted that there was an error in the email address used to send this RFP to the third potential supplier. There is no indication on file that the RFP was resent to the correct email address.
- 49) Despite the requirement in the CSPS Contract Management Framework—Procurement and Contracting Desk Guide for Fund Centre Managers and Admin Officers to ensure a rotation of suppliers over time, the same three suppliers were again invited to submit a proposal for the award of contract #12. This time, there is clear indication on file of efforts to find the email address of the supplier that had not received the RFP for contract #9. The process for contract #12 resulted in the Supplier being awarded the contract again. Documents contained in the procurement file revealed that one of the three companies invited did not submit a proposal because its resources were unavailable. The third company did not submit a proposal because it did not meet the mandatory requirement for a resource with experience in providing the subject matter training in the last three years. As the services were procured using a traditional competitive procurement process,² the CSPS does not know if other suppliers could have met this requirement.
- 50) The CSPS Contract Management Framework—Procurement and Contracting Desk Guide for Fund Centre Managers and Admin Officers requires the Program to identify “three suppliers who can submit a proposal,” which was not the case for the three suppliers invited to submit a proposal for the award of contracts #9 and #12. The PCU brought the matter to the attention of the Program and asked why and how an unqualified supplier was chosen to submit a proposal. The Program responded, “it is not possible to know ahead of time if a consultant or a specific company will meet the criteria or not, unless specific information on this company is requested before it is listed as a potential bidder. Moreover, we have

² A traditional competitive procurement process is a process whose openness is limited by the number of suppliers invited to compete for a potential contract, as opposed to a bidding process that is open to all interested bidders.

no reason not to offer the opportunity to bid on the RFP to the largest number of firms possible... However, they obviously have to meet all the requirements [translation].”

Conclusions

- 51) OPO concludes on the following grounds that the CSPS has not abided by its own policy to ensure a rotation of qualified suppliers invited or its policy to invite three suppliers who can submit a proposal:
- a. The same two suppliers were invited to submit a proposal for the award of contracts #6, #9 and #12. This does not ensure a rotation of suppliers invited.
 - b. There was an error in the email address of one of the suppliers invited and no indication on file that this supplier ever received the RFP for contract #9. Therefore, only two suppliers were given the chance to submit a proposal.
 - c. For the award of contract #12, three companies were invited. However, it is not known whether the supplier who did not submit a proposal could meet the requirements of the RFP. Furthermore, the third supplier indicated during the process that it did not meet the requirements.
- 52) Despite what is obviously an ongoing requirement, OPO could not find evidence that the CSPS had undertaken specific actions to identify potential qualified suppliers to provide the subject matter training services and ensure best value. The requirements were not opened publicly to all potential suppliers; the CSPS did not post any requirements on MERX™ or conduct a Request for Information to identify potential qualified suppliers meeting the requirement as defined in paragraph 41; and the CSPS does not currently have a list of known qualified suppliers who could provide the subject matter training services, which would ensure a rotation of the suppliers invited.
- 53) While a cursory review of the process utilized by the CSPS provides the illusion of compliance with policy, a more detailed examination of the process reveals that only a limited number of preselected suppliers were invited to submit a proposal for delivery of the subject matter training.

Concern 4—Undisclosed requirement and acceptance of non-compliant bid

Analysis

Undisclosed requirement

- 54) Canadian jurisprudence defines a fair tendering process as including the duty to award the contract as tendered. As stated by the Supreme Court of Canada, this duty is based on the idea that the tendering process seeks to “replace negotiation with competition” (*M.J.B Enterprise Ltd. v. Defence Construction (1951) Ltd.*). Moreover, post-bidding changes can affect the fairness of the tendering process as they undermine the level playing field and equal treatment

of each competing supplier, as determined by the Procurement Review Board of Canada³ in *Re Bio-Temp Scientific Inc.*

Acceptance of non-compliant bid

- 55) Jurisprudence also includes the duty to reject non-compliant bids. In *Carrocci v. McDougall (Township)*, the Ontario Superior Court determined that close to meeting a requirement is not good enough and should render a bid non-compliant.
- 56) The CSPS Contract Management Framework—Procurement and Contracting Desk Guide for Fund Centre Managers and Admin Officers states, “a report is needed which explains the points awarded for each criterion, for each proposal. The PCU conducts a due diligence review of bid evaluation results,”

Observations

- 57) The estimated level of effort was not clearly indicated in the RFP for the award of contract #12. OPO noted that the estimated level of effort indicated in the RFP was to provide a total of four courses. There was a comment in the RFP stating, “CSPS has the right to substitute and/or add course dates and courses depending on demand.” However, the funds committed on the Purchase Requisition for the requirement, even before the RFP was sent to the three potential suppliers, allowed for the delivery of a total of 16 courses. Also, the contract awarded included 12 additional courses to be delivered. The Supplier submitted a price proposal for the first 4 courses to be delivered, for a total of \$12,000.00, HST excluded. However, the contract awarded was in the amount of \$48,000.00, HST excluded.
- 58) An issue was also identified in the way the Supplier’s proposal was assessed by the Evaluation Team for the award of contract #9. Suppliers were required to have delivered a minimum of three courses in French, English or both languages, and would be awarded a contract in accordance with the language(s) they could meet. The Supplier’s proposal was accepted as meeting the minimum requirement regarding the number of courses to be delivered in French, despite the fact that it was noted on the evaluation sheet, “this information is not clear in the bid.”

Conclusions

- 59) OPO concludes the following:
 - a. Regarding the undisclosed requirement: The CSPS did not fully disclose the requirement for the award of contract #12 in a manner that would be fair or transparent to all potential suppliers. The contract awarded included an additional 12 courses. Specifying the potential for up to 16 courses in the

³ Predecessor to the Canadian International Trade Tribunal.

- RFP, instead of mentioning just the known 4, would have been more transparent and could have affected the decision of the supplier who decided not to bid.
- b. Regarding acceptance of a non-compliant bid: In the case of contract #9, the CSPA has not respected its duty to reject non-compliant bids. The information regarding provision of subject-matter-related training in French was not clearly indicated in the proposal and should have resulted in non-compliance with the French portion of the requirement. Despite this, the resulting contract included the provision of both English and French training.

Concern 5—Management control framework

Analysis

- 60) OPO reviewed the key CSPA documents that constitute the policy/directive parameters of the CSPA procurement management control framework. Those documents were:
- a. the CSPA Contracting Policy, which is an extension of the TBS Contracting Policy, adapted for the purposes of the CSPA;
 - b. the CSPA Contract Management Framework—Procurement and Contracting Desk Guide for Fund Centre Managers and Admin Officers;
 - c. the Procurement and Contracting Checklist; and
 - d. the terms of reference for both the quality assurance function and the Contract Review Committee.

Observations

- 61) While OPO did not observe any shortcomings in these documents, the results of this review demonstrate that policies were breached and that procedures and the procurement management control framework were circumvented.
- 62) While repetitive sole source contracting is covered by both the CSPA Contracting Policy and the CSPA Contract Management Framework—Procurement and Contracting Desk Guide for Fund Centre Managers and Admin Officers, such contracting requires self-declaration by the Program to the PCU whenever a third contract is issued to the same supplier without competition within a 12-month period. This safeguard can only be effective when the PCU is advised of non-competitive contracts issued within the Program's delegated contracting authority; failure to share this information impedes the PCU's ability to monitor repetitive sole sourcing.
- 63) Competitive processes and the use of source lists of qualified suppliers are also covered by the CSPA Contract Management Framework—Procurement and Contracting Desk Guide for Fund Centre Managers and Admin Officers. The Program creates and maintains the list of qualified suppliers. This list must be shared with the PCU, but there is no indication that the qualifications of the

suppliers on the list are verified by the PCU. Furthermore, the TBS Contracting Policy includes a requirement to notify potential suppliers when departments use a source list. This was not done by the CSPS for the subject matter training services.

- 64) The Procurement and Contracting Checklist is also mentioned in the CSPS Contract Management Framework—Procurement and Contracting Desk Guide for Fund Centre Managers and Admin Officers. Not only is the Checklist a tool to assist managers, it also forms an integral part of procurement files. However, it is not possible to rely on the information provided on the Checklist for some of the contract files at issue, as the information was not accurate or was not provided. Without reliable information, the oversight function cannot operate effectively. In the files reviewed, both the PCU and the Program did not carry out their respective responsibilities with respect to integrity of the information.
- 65) The quality assurance function is defined in the Overview of Procurement and Contracting Quality Assurance Function. Quality assurance (QA) was performed on a random basis during the period from February 2010 to June 2011, yet it did not identify the repetitive sole sourcing done with the Supplier (see Table 2). Furthermore, QA was performed on the procurement file related to contract #4. OPO noted irregularities in the conclusions drawn by the PCU officer who performed the QA, with regard to the following five points:
- a. Adequate support for sole source—The QA report indicates that an adequate sole source justification was on file. However, the sole source justification did not provide a reason as to why it was not cost-effective to compete the requirement, as required by policy.
 - b. Sole source was questioned—The answer provided in this regard was “not applicable”. However, this contract was awarded on a sole source basis. Thus, the “not applicable” response should not have been allowed.
 - c. Effort made to seek alternate sources—Once again, the answer provided in this regard was “not applicable”. However, this contract was awarded on a sole source basis. Thus, the “not applicable” response should not have been allowed.
 - d. Price/Rate certification included—The answer provided in this regard was “[n]o... [n]ot part of SOW requirements”. However, policy requires price/rate justification when a contract is awarded without competition.
 - e. No splitting of requirement to circumvent authority limits—The answer provided in this regard was “not applicable.” However, contract #4 was awarded before the last training session of contract #2 had been delivered and therefore should have been considered contract splitting. The QA officer’s answer was thus inappropriate.

Conclusion

- 66) The effectiveness of the procurement management control framework relies on the disclosure of information by the Program and on a thorough examination of

the information by the PCU. In the case of the files reviewed, these two elements of the framework were undermined. Therefore, the checks and balances did not operate as intended. This has left the CSPA vulnerable to the perception that the Supplier was favoured and that the system was manipulated to obtain the services of the pre-identified supplier.

Final Observations and Conclusions

- 67) OPO notes that the procurement process for the award of the subject matter training services evolved from being completely non-competitive in the first year to traditional competitive in the last year, which was brought about by the PCU's diligence and efforts. As the PCU is a key element of the CSPA management control framework, OPO is concerned that the effectiveness of the PCU's role was undermined by Program staff and that the advice of PCU staff was disregarded.
- 68) OPO has identified concerns with the fairness, openness and transparency of the overall process.
- a. Fairness requires providing equal treatment to all current and potential suppliers. As concluded in the section on Concern 4, above, by not providing the full scope of the requirement and by accepting a proposal that was non-compliant in part, the CSPA was unfair to other potential bidders, which undermines the fairness of the process.
 - b. Openness requires providing all potential suppliers with the opportunity to submit bids for government procurement. This principle was not respected. OPO has uncovered evidence to conclude that the CSPA has engaged in contract splitting and issued repetitive sole source contracts to the same supplier. Moreover, the CSPA did not develop a source list or publicly open the requirement to all potential qualified suppliers to submit a proposal, as required by the TBS and CSPA contracting policies.
 - c. Transparency requires providing information to Canadians in a timely manner that facilitates public scrutiny of the decisions made and actions undertaken. The CSPA used sole source justifications that did not explain why it was not cost-effective to compete the requirement; did not show support for the price being charged; and did not have accurate information on file. These factors do not facilitate scrutiny of the decisions made.

Comments from the CSPA

- 69) The CSPA was provided with an opportunity to comment on the findings of this report. In its response, the CSPA stated that a Management Action Plan had been developed and measures taken to address and mitigate the issues identified in this report. The Plan includes:
- i. the adoption of an integrated procurement planning approach for the procurement of the subject matter training to assist the CSPA in identifying the appropriate procurement vehicle;
 - ii. use of a Request for Information (RFI) to expand the list of potential suppliers qualified to deliver the subject matter training;
 - iii. strengthening of the quality assurance function and expansion of the monitoring system;
 - iv. a review of the CSPA Contracting Policy and Desk Guide; and,
 - v. training of responsibility center managers to increase their understanding of procurement processes (including the evaluation process).

Annex A

Contracts for Delivery of Subject Matter Training Services for 2009-2012 Period

